



REASONS FOR DECISION

Fair Work Act 2009

Section 418 - Application for an order that industrial action by employees or employers stop etc

Utilities Management Pty Ltd T/A SA Power Networks

v

**Communications, Electrical, Electronic, Energy, Information, Postal,
Plumbing and Allied Services Union of Australia**
(C2021/7979)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 26 NOVEMBER 2021

Application for an order that industrial action by employees or employers stop

[1] These are the reasons for decision delivered *ex tempore* at the conclusion of proceedings on 25 November 2021. They have been supplemented for completeness.

[2] This decision concerns an application dated 24 November 2021 under section 418 of the *Fair Work Act 2009* (Cth) (FW Act) by Utilities Management Pty Ltd T/A SA Power Networks (SAPN or the employer) for orders that industrial action notified by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) to commence at 12.01am on 26 November, 29 November, 30 November, 1 December, 2 December and 3 December 2021 respectively should be ordered to stop on the ground that it is not protected action.

[3] I heard the matter on 25 November 2021.

[4] I granted permission for SAPN to be represented (by Mr Denton of counsel) notwithstanding an objection by the CEPU (self-represented by Mr Adley SA Branch Secretary). My reasons were that proceedings would be more efficiently conducted particularly having regard to the issue requiring determination.

[5] I received evidence (via witness statements) from four persons: Cassandra Durdin (SAPN Manager Operations Planning)¹ and three persons called by the CEPU, Benjamin Jewell (SA Branch Organiser)² and two powerline workers (Graham Hearnden and Adam Zubrinich³). Ms Durdin and Mr Jewell gave oral evidence.

[6] In advance of the hearing I directed the parties into private conciliation. The matter did not resolve.

¹ SAPN1

² CEPU3

³ CEPU2 and CEPU1

[7] At the conclusion of the hearing, and after a short adjournment, I delivered my decision.

Facts

[8] The facts are largely not in dispute.

[9] The industrial action was notified by six separate notices under section 414 of the FW Act issued by the CEPU since 18 November 2021.

[10] The proposed industrial action is to take place in the context of lengthy and heavily disputed bargaining for a new agreement. Industrial action in support of bargaining has been taken by the CEPU in past months (in particular April to June 2021). The notices of industrial action the subject of this application are thus not the first notices of action by the CEPU nor the first occasion in which industrial action has been taken in the current bargaining context. However, whilst the past and the proposed action is taken pursuant to the same ballot authorisation, the notices of industrial action the subject of this application are in somewhat different form to the earlier CEPU notices.

[11] It is not disputed that the currently notified action falls within the scope of a protected action ballot that was authorised by vote of employees declared on 24 March 2021⁴ following the issuing of a protected ballot order by the Commission on 3 March 2021⁵.

[12] It is not disputed that each of the notices (as did the relevant ballot questions) do not authorise industrial action “in emergency situations”.

[13] The matter for determination is the adequacy of the notices and in particular whether they comply with the requirements of section 414 of the FW Act.

[14] It is not disputed by the CEPU that unless the notices it has issued are compliant with the FW Act and in particular section 414 then the proposed action would not be protected.

[15] Equally, it is not disputed by SAPN that if the notices are compliant with the FW Act then the proposed action would, on its face, be protected action for the reasons I have identified.

[16] So, are the notices compliant with section 414? Section 414 provides:

“414 Notice requirements for industrial action

Notice requirements—employee claim action

- (1) Before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

⁴ CD2 and BJ1

⁵ CD1

- (2) The period of notice must be at least:
 - (a) 3 working days; or
 - (b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph—that period of notice.

Notice of employee claim action not to be given until ballot results declared

- (3) A notice under subsection (1) must not be given until after the results of the protected action ballot for the employee claim action have been declared.

Notice requirements—employee response action

- (4) Before a person engages in employee response action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

Notice requirements—employer response action

- (5) Before an employer engages in employer response action for a proposed enterprise agreement, the employer must:
 - (a) give written notice of the action to each bargaining representative of an employee who will be covered by the agreement; and
 - (b) take all reasonable steps to notify the employees who will be covered by the agreement of the action.

Notice requirements—content

- (6) A notice given under this section must specify the nature of the action and the day on which it will start.”

[17] The notices relevantly provide:

“Notice by Bargaining Representative of Employees of Intention to take Employee Claim Action (s.414)

TO: Jakob Goodwin (“Employer”)
Human Resources Manager
Utilities Management Pty Ltd T/A SA Power Networks and Enerven
1 Anzac Hwy.
Keswick
South Australia 5035

The Communication Electrical Electronic Energy Information Postal Plumbing and Allied Services Union of Australia – South Australian Branch (CEPU) as a bargaining representative of employees who will be covered by a proposed enterprise agreement in relation to the Employer, hereby gives notice of the intention of the CEPU, its officers and employees, and members of the CEPU employed by the Employer, to take the following employee claim action:

Nature of intended industrial action:

- An unlimited number of stoppages on the performance of work for up to and including 4 hour periods (except for emergency situations)
- An unlimited number of stoppages on the performance of work for up to and including 8 hour periods (except for emergency situations)

The location of the intended industrial action:

At various locations throughout South Australia by employees of the employer

Date on which industrial action will begin:

26th of November 2021, commencing 12:01am.

Signed:

Benjamen Jewell”

[18] Each of the six notices are in identical terms save that the five other notices substitute the date 26 November 2021 with 29 November 2021, 30 November 2021, 1 December 2021, 2 December 2021 and 3 December 2021 respectively.

[19] It is not in dispute that SAPN operates in the electrical power industry and leases, manages and operates poles and wires across South Australia. It supplies electrical power to approximately 900,000 customers in South Australia via its distribution network including all South Australian domestic customers and most commercial and industrial customers.

[20] The persons authorised to take industrial action are those who will be covered by the proposed enterprise agreement and for whom the CEPU is a bargaining representative. That is approximately 900 of SAPN’s workforce of 2,136 persons. All such persons are employed in South Australia and the geographic coverage of the proposed agreement is the State of South Australia.

Submissions

[21] SAPN says that the notices are deficient in the sense of being “ambiguous and too broad”⁶ because overall they do not provide a level of particularity that enables SAPN “to take appropriate defensive action”⁷ to protect its business interests in the face of imminent industrial action.

⁶ Written submissions paragraph 24

⁷ *ibid*

[22] The CEPU says that the notices provide the information required by the FW Act, that the union has given SAPN a greater period of notice than required by the protected action ballot order (five days rather than three days), and that past notices and past industrial action with respect to this bargaining round were not objected to by SAPN on this basis.

Consideration

[23] The statutory requirement that the notices “specify the nature of the action and the day on which it will start” is mandatory. Section 414(6) provides that the notices “must” specify those matters.

[24] The notices in question each specify the day on which the proposed industrial action will start – “commencing 12.01am” on the specified calendar day. There is no ambiguity or inadequacy in that regard. To that extent, the notices are compliant.

[25] However, do the notices “specify the nature of the action” with a sufficient level of particularity to be complaint? It is well established that for notices of protected action to be complaint with section 414(6) (or its predecessors) they must convey sufficient information to enable the employer to take defensive action to protect its interests in the face of the notified industrial action.⁸

[26] Whether a notice under section 414 is adequate in the sense of complaint with the FW Act depends on the terms of the notice itself in the context of the proposed action. That context includes a consideration of factors such as the nature of the employer’s operations including its size, the number of employees, the number of locations from which it conducts business and the potential categories of employees taking action.⁹

[27] Here, the notices apply to a relatively large cohort of employees employed across a large number of geographically diverse locations. As noted, the potential cohort of employees entitled to take protected action are members of the CEPU to be covered by the proposed agreement. As further noted, that would appear to be approximately some 900 of 2,131 employees. There are 36 different locations from which SAPN operates in South Australia from which the relevant cohort of employees work or are based.¹⁰ These are in Adelaide and relevantly, scattered throughout the State. However, whilst some are office-based workers working in one geographic location throughout a shift many of these employees work in crews and are required to move within a designated geographic radius to perform work – which could be any location where powerline assets are located.

[28] These contextual considerations are relevant to assessing whether the notices are of sufficient particularity to enable SAPN to take the defensive action implicit in the requirement of section 414(6) that the “nature of the action” be specified.

[29] I agree that the notices need be considered as a whole and in the context of SAPN’s operations.

⁸ *David’s Distribution Pty Ltd v National Union of Workers* [1999] 165 ALR 550

⁹ *Telstra Corporation Limited v CEPU* [2009] FWAFB 1698

¹⁰ Ms Deardin SAPN1 paragraph 15

[30] Those operations involve the provision of an essential service to households and businesses. Manning crews involves an assessment by SAPN of work to be performed as well as safety and regulatory requirements. Full time workers usually work eight hour shifts though on-call work can extend those shifts. Planning for both regular work as well as emergency circumstances, involves complexity. Planning in the face of proposed industrial action presents increased difficulty.¹¹

[31] The statutory test under section 414 is not whether difficulties or even significant difficulties arise for SAPN to manage its workforce in the face of protected industrial action or whether operations will be disrupted. Industrial action by its nature, particularly stoppages, is likely to create difficulty for any business in meeting usual operational requirements. In a large business such as SAPN action of the type proposed (being four and eight hour stoppages) is likely to create difficulties many of which are well referenced in the evidence of Ms Durdin.

[32] That is not however a basis on which this application, grounded as it is on the proposition that the notices under section 414 are non-compliant, is based. I note that this is not an application to suspend or terminate protected industrial action under other provisions of the FW Act on the ground, for example, that it is causing or threatening to cause significant economic harm (section 423) or endanger to life (section 424) or causing significant harm to a third party (section 426).

[33] The issue is simply whether the notices are complaint.

[34] I am not satisfied that the CEPU notices are materially deficient.

[35] I am satisfied that each notice specifies the nature of the action and also the day on which the action will start.

[36] In a number of respects the notices could be worded more clearly but that also is not the statutory test. I am not satisfied that the notices are worded in a manner that make them non-complaint. The notices provide the required information in the sense that they convey information to SAPN about the nature of the action proposed and the day on which the action is to commence such that SAPN would be able to take at least a minimum level of defensive action to protect its interests. I make this finding taking into account the need to assess the notices in the context in which their terms overall are received by SAPN and not as necessarily as intended by the union author.¹²

[37] That there are proposed to be an unlimited number of stoppages notified of up to four and eight hours is not ill-defined.

[38] That there is an exclusion for “emergency situations” has meaning, bearing in mind that this term is to be understood largely in the context of those that receive it.

[39] That the notices refer to action at “various locations” provides little clarity. SAPN is left to cater for a worst-case scenario of all locations being potentially impacted to protect its

¹¹ Ibid paragraphs 16 to 26

¹² *Esso Australia Pty Ltd v Australian Workers Union* 2015] FCA 758 at [86]

interests even though investing in defensive action on that scale may be unnecessary. However, it is across each of those locations that industrial action has been authorised. In the context of this business where many of those employees work in road crews and branch-out during their shifts to various road-side locations¹³ that cannot be determined in advance, this is not a basis on which to conclude the notices are non-compliant.

[40] I accept that the potential cumulative impact of the notices raise the likelihood of action by the same 900 employees or crews over adjoining days, and that this adds difficulty for SAPN to defensively protect its legitimate interests. However, whilst giving weight to this factor and considering the notices as a whole, I nonetheless remain satisfied that they provide SAPN with the minimum required level of information to take defensive action.

[41] Whilst a greater degree of specificity was applied by the CEPU in its earlier notices of industrial action, and whilst it I consider it appropriate for the union to reflect on legitimate concerns raised by SAPN in these proceedings between these current notices and those earlier issued, I am not persuaded that the notices are non-compliant.

Conclusion

[42] Therefore, there is no basis for an order to be made under section 418 as the proposed action is not unprotected on the ground asserted.

[43] The application is dismissed.

[44] An order giving effect to this decision is issued in conjunction with the publication of these reasons.¹⁴



DEPUTY PRESIDENT

Appearances:

A Denton (of counsel) with T Duthrie and K Smith, *with permission*, for Utilities Management Pty Ltd T/A SA Power Networks

J Adley, *on behalf of*, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

¹³ Mr Zubrinich CEPU1 and Mr Hearnden CEPU2 paragraphs 3 and 4

¹⁴ PN PR736222

[2021] FWC 6471

Hearing details:

2021
Adelaide (by video conference)
25 November 2021

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